IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 4, 2008 Session

ESTATE OF GORDAN WAYNE HOWARD, ET AL. v. FIRST COMMUNITY BANK OF EAST TENNESSEE, ET AL.

Appeal from the Circuit Court for Hawkins County
No. 05CV0154 John K. Wilson, Judge

No. E2007-02391-COA-R3-CV - FILED FEBRUARY 27, 2009

In September 2003, Gordan Howard and his wife, Deborah Howard, applied for life insurance while in the process of obtaining a loan at First Community Bank of East Tennessee ("the Bank"). They applied for the insurance with Mountain Life Insurance Company ("Mountain Life"). A few months before applying for the insurance, Gordan Howard had been medically treated for chronic liver disease resulting from alcohol abuse. When Mr. Howard applied for insurance with Mountain Life, he stated that he had not been treated by a physician in the past twelve months, and that he had not been treated for liver disease in the past ten years. Less than six months later, Mr. Howard died from cirrhosis of the liver and alcoholic liver failure. When Mountain Life denied Mrs. Howard's claim for benefits, she filed this lawsuit in her individual capacity and as executrix of her husband's estate. The trial court granted the Bank's motion to dismiss and, thereafter, granted Mountain Life's motion for summary judgment. Mrs. Howard appeals, claiming the trial court erred when (1) it dismissed her claim against the Bank and (2) granted Mountain Life summary judgment. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

William E. Phillips, Rogersville, Tennessee, for the appellant, Deborah Lynn Wells Howard, individually and as Executrix of the Estate of Gordan Wayne Howard.

L. Eric Ebbert, Knoxville, Tennessee, for the appellee, First Community Bank of East Tennessee.

Heather G. Anderson, Knoxville, Tennessee, for the appellee, Mountain Life Insurance Company.

OPINION

I.

On September 22, 2003, Gordan Howard and Deborah Howard filled out a joint application for life insurance while seeking a loan from the Bank. The life insurance policy was to be issued by Mountain Life. According to the complaint:

> That defendant First Community Bank of East Tennessee, and its officers and employees engaged in the making of loans on behalf of said defendant, are agents of defendant Mountain Life Insurance Company, and as such are authorized to take and approve applications for credit life insurance from . . . individuals acquiring loans from defendant bank.
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> That on or about September 22, 2003 the defendant bank by and through its officers, agents and employees, entered into a loan arrangement whereby the [Howards] executed a promissory note for the sum of $60,837.86 . . . , which promissory note was secured by certain equipment and a motor vehicle owned by the makers. Said promissory note was a renewal of previous promissory notes by said makers to the defendant bank.
>
> At the time and place of the making of the aforesaid promissory note the defendant bank . . . [and/or] John L. Campbell, as agent for the defendant insurance company, took the application of the makers for a policy of credit life insurance insuring that in the event either of the makers should expire prior to payment of the loan in full the loan will be paid in full. The makers were charged the sum of $4,317.31 as a premium for the life insurance, and certificate number 20123345 was issued to the makers by the defendant insurance company. . . .
>
> Thereafter, in February of 2004, Gordan Howard was diagnosed with cancer, and he expired on March 15, 2004.
>
> A claim was made upon the defendants for payment of the indebtedness aforesaid by virtue of the credit life insurance policy issued upon the life of Gordan Howard. The defendant insurance company failed and refused to make payment upon the claim.
>
> The actions of the defendants in taking payment of the premium from Gordan Howard and in issuing the certificate of insurance to Gordan Howard completed the insurance contract between the plaintiff and defendants, and the defendants are estopped from denying the same.

> Failing to pay upon the claim of the deceased, even though the premium for the insurance policy had been paid in full, and a certificate of insurance had been issued, constitutes a material misrepresentation by the defendants to the plaintiffs regarding the policy of credit life insurance and the issuance of same and constitutes a fraud imposed upon the plaintiff by the defendants.

(Paragraph numbering in original omitted).

In addition to claims for misrepresentation and fraud, plaintiff asserted claims for breach of contract, negligence, and a violation of the Tennessee Consumer Protection Act ("the TCPA"), T.C.A. § 47-18-101, *et seq*.

The Howards applied for two types of life insurance. According to the application for insurance ("the Application")[1] filled out by the Howards, the policy would have consisted of joint level term life insurance on both of the Howards in the amount of $17,174.84. In addition, there would have been joint decreasing term life insurance on both of the Howards in the initial amount of $55,848.81. The Application also provided:

> It is a crime to knowingly provide false, incomplete or misleading information to an insurance company for the purpose of defrauding the company. . . . I voluntarily apply for insurance on the attached certificate, I declare and agree that to the best of my knowledge and belief that the answers to the above questions are complete and true. As a condition of coverage, I certify that I am now free from any disease or physical impairment. . . .
>
> I understand that this Application is subject to approval. If it is approved, the Application will become part of the certificate to which it is attached. Upon acceptance of the insurance and within 30 days of the incurred indebtedness, the Insurer shall cause a certificate of insurance to be delivered to you. If the insurance is not approved, any premiums paid will be refunded. However, if a valid claim arises before action has been taken, consideration of the Application for approval will continue as if no claim has been incurred.

Both of the Howards signed the document containing the above certification. The Application further provided:

[1] The Howards filled out a one page application and also contemporaneously received a one page certificate, referred to by plaintiff as "Certificate No. 20123345." We will refer to these documents collectively as "the Application."

> JOINT TERM LIFE INSURANCE - If, in addition to the Insured Debtor, a Joint Insured is named, and the required premium for Joint Term Life Insurance has been paid and recorded, the insured Debtor and the Joint Insured shall be covered by Term Life Insurance, provided, however, that the Company's liability shall be limited to the payment of **ONE** such death benefit, notwithstanding the death, simultaneous or otherwise, of both the Insured Debtor and the Joint Insured. . . .[2]
>
> * * *
>
> **8. EXCEPTIONS**
>
> 1. Life Insurance – The Company's liability is limited to the premiums paid by the Debtor if liability arises by reason of death occurring within six months after the effective date of coverage and resulting from a disease, injury, or condition of health for which the Debtor was hospitalized or received medical or surgical treatment or advice within six months of the effective date of the Debtor's insurance.

(Bold type, underlining, and capitalization in the original)

At the bottom of the first page of the Application, the following is set apart from the body of the policy and is in all capital letters:

> SINGLE PREMIUM CREDIT LIFE AND
> DISABILITY INSURANCE
> WITH PRE-EXISTING CONDITION AND
> TWO-YEAR SUICIDE EXCLUSION
> GROUP CREDITOR-DEBTOR
> INSURANCE ONLY

Mr. Howard was also asked to sign a release so Mountain Life could obtain his medical records. The medical records release states:

> **Completion of this Authorization is required in order to consider your application for our insurance or to make a determination of eligibility for benefits on your claim.**

(Bold type in original.)

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[2]Gordan Howard was the "Insured Debtor" under the policy, and plaintiff was the "Joint Insured Debtor." The parties on appeal are in agreement that the applicable insurance premium was paid.

As this litigation proceeded, the complaint was amended various times. At all times the defendants denied any liability to plaintiff. In May 2005, the Bank filed a motion to dismiss. As pertinent to this appeal, the Bank claimed plaintiff failed to state a claim upon which relief could be granted as to it because: (1) plaintiff's claims arose out of the insurance contract and the pre-existing condition exclusion clause barred plaintiff's claims; and (2) the Bank was only an agent for Mountain Life and is not liable for the contractual obligations of the principal. In December 2005, the trial court granted the Bank's motion. The order granting the motion does not specifically state the reason(s) for granting the motion.

Mountain Life filed a motion for summary judgment. Among other things, Mountain Life claimed that the undisputed material facts establish: (1) that no policy of insurance had ever been accepted or issued by Mountain Life; (2) that, because Mr. Howard died from a pre-existing condition within six months of filling out the Application, he was contractually limited to a refund of the amount of the premium paid, and the amount of the premium had been refunded to plaintiff; and (3) that Mr. Howard made material misrepresentations on the Application for insurance and, consequently, all of plaintiff's claims were barred.

The Statement of Undisputed Facts filed in support of the motion for summary judgment relied primarily upon the language of the Application and the affidavit of Mary E. Bunting, a Vice-President of Mountain Life. According to this affidavit:

> On or about September 22, 2003, [the Howards] went to the Bank to obtain a loan. . . .
>
> At such time, [the Howards] applied for credit life insurance. Accordingly, [the Howards] executed Mountain Life's Application for Group Credit Life and Disability. . . .
>
> The Application also asked Mr. Howard whether he had "consulted or been treated by any physician or other medical practitioner during the past twelve (12) months." Mr. Howard inaccurately checked the "No" box in response to this question. . . .
>
> [On that same date] Mr. Howard [also] signed a Medical Records Release Authorization. . . .
>
> On January 7, 2004, January 28, 2004, and February 19, 2004, Mountain Life sent three (3) separate letters to the Bank indicating that [the Howards'] application for credit life insurance was still incomplete. A true and exact copy of each letter sent by Mountain Life is attached hereto . . . .
>
> On or about February 25, 2004, Mountain Life finally received a completed application for credit life insurance for [the Howards] from the Bank and began the underwriting process.

On March 9, 2004, Mountain Life sent a letter to the Bank stating its underwriting department had to evaluate Mr. Howard's medical records to determine Mr. Howard's eligibility or ineligibility for coverage and would notify the Bank of its decision after receiving and reviewing such records. A true and exact copy of such letter as sent by Mountain Life to the Bank is attached hereto . . . .

On March 24, 2004, March 25, 2004, April 6, 2004, April 8, 2004, April 22, 2004, and May 5, 2004, Mountain Life attempted to obtain Mr. Howard's medical records from Dr. Mark J. Dalle-Ave ("Dr. Dalle-Ave"), Mr. Howard's personal physician. A true and exact copy of Mountain Life's communications via facsimile and telephone communications to Dr. Dalle-Ave's office requesting such records is attached hereto . . . .

Finally, on May 12, 2004, Mountain Life received Mr. Howard's medical records from the Bank after *Ms. Howard* hand delivered such records to the Bank from Dr. Dalle-Ave's office.

On or around May 14, 2004, Mr. and Mrs Howard's Application for credit life insurance was denied by Mountain Life due to the ineligibility of Mr. Howard based on his medical history. A copy of the letter denying such coverage is attached hereto . . . . Such letter also invited Ms. Howard to reapply for credit life insurance individually.

Mountain Life never issued an insurance policy to [the Howards] in connection with the September 22, 2003 loan transaction. Mountain Life refunded the total amount of premium it received from the Bank to be applied to the loan of Mr. and Mrs. Howard. A true and exact copy of such refund check is attached [hereto] . . . .

Mr. Howard died on March 15, 2004 as a result of liver cirrhosis and alcoholic liver failure. A true and exact copy of Mr. Howard's death certificate is attached [hereto] . . . .

Had credit life insurance been in effect for Mr. Howard at the time of his death, Mountain Life would have denied liability beyond the amount of the premium due to the exclusion in Paragraph 8 of the certificate, which is issued by Mountain Life to the applicant *only after* an insurance application is *approved.* A true and exact copy of the insurance certificate is attached hereto . . . .

The pre-existing exclusion in Paragraph 8 of the certificate states as follows:

> The Company's liability is limited to the premiums paid by the Debtor if liability arises by reason of death occurring within six months after the effective date of coverage and resulting from a disease, injury, or condition of health for which the Debtor was hospitalized or received medical or surgical treatment or advice within six months of the effective date of the Debtor's insurance.
>
> The policy of insurance provides the same. A true and exact copy of the insurance policy is attached hereto . . . .

(Original paragraph numbering omitted; emphasis in the original)

On the Application, Mr. Howard checked the "No" box for the following two questions:

> 1. Have you been in a hospital for any observation, operation or treatment, or consulted or been treated by any physician or other medical practitioner during the past twelve (12) months?
>
> 2. Are you now disabled, receiving treatment of any kind, or contemplating an operation?

The next question asked Mr. Howard if, during the past ten years, he had been treated by a licensed physician for a number of different specified ailments including heart disease, liver disease, high blood pressure, cancer, and drug or alcohol abuse. Mr Howard answered this question "yes." Mr. Howard was further asked to explain any "yes" answers. His response was only that he had been treated for high blood pressure in 1993 by Dr. Mark Dalle-Ave.

Because Mr. Howard indicated on the Application that he had been treated for high blood pressure in 1993, Mountain Life sought to obtain Hr. Howard's medical records to verify that he was insurable. As mention in Bunting's affidavit, Mountain Life had trouble obtaining Mr. Howard's medical records. Once Mountain Life finally received the medical records, they revealed that Mr. Howard had been treated several times by more than one physician within twelve months of applying for insurance. Mr. Howard was involved in a motor vehicle accident on March 3, 2003, approximately six months before he filled out the application for life insurance. Mr. Howard had received medical treatment from various doctors as a result of the automobile accident, which he claimed resulted in injuries to his "arm, leg, neck & back." Mr. Howard was treated at the Holston Valley Medical Center and was seen by various physicians, including Dr. Mark Dalle-Ave. The medical treatment included at least five x-rays and various other diagnostic tests.

While being treated for the automobile accident, blood tests revealed that Mr. Howard's liver was not functioning normally. The medical records of Dr. Dalle-Ave reveal that Mr. Howard had chronic liver disease and an ultrasound was performed. Dr. Dalla-Ave's assessment as of March 28, 2003 – some six months before the application was filled out – was that Mr. Howard had (1) right

leg pain, possible cellulitis; (2) macrocytic anemia; (3) hypoalbuminemia; and (4) improving thrombocytopenia. Mr. Howard was again treated less than a week later and again was diagnosed with macrocytosis and thrombocytopenia, "most likely secondary to chronic liver disease."

On May 12, 2003, which is a little over 4 months before Mr Howard applied for life insurance, Mr. Howard was treated by Dr. Chainarong Limvarapuss at Kingsport Hematology-Oncology. Dr. Limvarapuss' notes indicate that he thought the macrocytosis and thrombocytopenia were secondary to Mr. Howard's consumption of alcohol and chronic liver disease. Dr. Limvarapuss recommended that Mr. Howard undergo a bone marrow biopsy. However, Mr. Howard informed Dr. Limvarapuss that "he does not wish to proceed with bone marrow biopsy today. He wishes to schedule the bone marrow biopsy for sometime next week." Mr. Howard was strongly advised to quit drinking alcohol.

Notwithstanding Dr. Limvarapuss' strong advice that Mr. Howard quit drinking alcoholic beverages, Mr. Howard continued to drink. On September 22, 2003, he filled out the Application for life insurance, stating that he had not been treated by a physician within the past twelve months and had not been treated for liver disease in the past ten years. He continued to drink alcohol. On February 4, 2004, Mr. Howard was admitted to the hospital for abdominal pain and swelling. The medical records state that Mr. Howard had a "long history of alcoholism." Mr. Howard stated that his last alcoholic drink was five days before being admitted to the hospital. Mr. Howard was discharged on February 10, but was seen in follow-up the next day. According to these records:

> [Patient] was diagnosed with end stage liver disease, alcoholic cirrhosis and coagulopathy likely secondary to his liver disease. . . . Mr. Howard states at times he will drink 2-3 beers a day, other days 4-5. His wife is also present and states that there have been times when he would drink 2-3 six packs in a day. He has not had any beer now in 10 days.

Medical notes from February 16, 2004, state that Mr. Howard "has the ravages of chronic alcohol abuse. His prognosis is very guarded in that he probably has quite advanced disease."

On March 15, 2004, Mr. Howard died. The death certificate lists the causes of death as "liver cirrhosis" and "alcoholic liver failure."

In response to Mountain Life's motion for summary judgment, plaintiff filed her own affidavit. That affidavit provides:

> That I, Deborah Lynn Wells Howard, am the Executrix of the Estate of Gordan Wayne Howard, and the plaintiff in this cause of action.
>
> That on or about September 22, 2003 my late husband, Gordan Wayne Howard, and I executed a promissory note made payable to First Community Bank of East Tennessee (the "Bank") in the amount of $60,837.86. This note is comprised largely of a renewal of

previous notes executed by us to the bank. The promissory note was secured by various restaurant equipment and other person[al] property belonging to me and my late husband.

The previous promissory notes executed by us to the bank, which notes were included in the September 22, 2003 note as renewals, were further secured by a policy or policies of credit life insurance issued by the defendant life insurance company, and for which my husband and I had paid the credit life insurance premiums thereon.

We advised Kaye Stewart, the bank officer and employee who was handling our loan, that it was very important for us to have credit life insurance upon our indebtedness to the bank, due in large part to our age and the fact that in the event either of us should die it would be extremely difficult for the survivor to run the business (which the loan proceeds have been used to finance, and which business generated the income to repay the loan.)

At the time of the execution of the September 22, 2003 promissory note my late husband and I paid a premium of $4,317.31 for the joint credit life insurance and were issued a certificate of credit life insurance by the bank loan officer, an agent of the defendant insurance company. The certificate was numbered Certificate No. 20123345.

We were never notified by any person or entity that the credit life insurance as represented by the above referenced certificate was not in effect nor was the premium paid ever refunded to us prior to my husband's death.

Several months subsequent to the execution of the aforesaid promissory note it became apparent that my husband was gravely ill and had been diagnosed with what we were advised was cancer. One day while discussing the issue of my husband's health with Kaye Stewart, the bank officer who handled our loan, I was advised by Kaye Stewart not to worry about the loan in [sic] the repayment thereof due to the fact that my husband and I had credit life insurance on the loan, and that in the event of my husband's death (which was imminent) the loan would be paid with the proceeds of the credit life insurance. Some weeks thereafter (in March of 2004) I was contacted by Kayee [sic] Stewart and advised that it would be necessary for my husband and I to resign our credit life applications due to some mix up by the bank or the insurance company. The applications were resigned and submitted to the bank. My husband expired on March 15, 2004.

> It was not until after weeks of my husband's death that I was notified by the defendant insurance company that we did not have credit life insurance, and that our "application" for credit life insurance had been denied. I subsequently learned that the bank had misplaced or for some reason failed to submit our credit life insurance application to the defendant insurance company. The bank had, however, submitted our payment to the defendant insurance company, and the same had been received and deposited.
>
> It was very important to my late husband and I that we acquire credit life insurance, or some type of life insurance to secure the indebtedness to First Community Bank in the event of either or both of our deaths. Had we known that we did not have credit life insurance we would have sought financing from some other source wherein credit life insurance could have been issued, or we would have acquired a life insurance policy in the amount sufficient to cover the debt from another insurance company. We were misled into believing that our credit life insurance policy was in full force and effect.[3]

Following a hearing on Mountain Life's motion for summary judgment, the trial court entered an order granting that motion. Again, the reason(s) for the granting of the motion is not set forth in the order. Plaintiff filed a motion to alter or amend the judgment which the trial court denied, and this appeal ensued.

II.

Plaintiff raises two broad issues on appeal. First, she claims that the trial court erred when it granted the Bank's motion to dismiss, and, second, she claims that the trial court erred when it granted Mountain Life's motion for summary judgment.

III.

Our standard of review as to the granting of the Bank's motion to dismiss is set forth in ***Stein v. Davidson Hotel Co.***, 945 S.W.2d 714 (Tenn. 1997), wherein the Court explained:

> A Rule 12.02(6), Tenn. R. Civ. P., motion to dismiss for failure to state a claim upon which relief can be granted tests only the legal sufficiency of the complaint, not the strength of a plaintiff's proof.

[3] This was the second affidavit filed by the plaintiff detailing the process she and her husband went through to apply for the life insurance policy. The first affidavit made no mention whatsoever of Kaye Stewart, much less any alleged conversations with Kaye Stewart. Kaye Stewart testified that she recalled a discussion with plaintiff about the possibility of plaintiff filing for bankruptcy, but Stewart did not recall telling plaintiff not to worry about the loan because she had life insurance coverage.

> Such a motion admits the truth of all relevant and material averments contained in the complaint, but asserts that such facts do not constitute a cause of action. In considering a motion to dismiss, courts should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true, and deny the motion unless it appears that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief. *Cook v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994). In considering this appeal from the trial court's grant of the defendant's motion to dismiss, we take all allegations of fact in the plaintiff's complaint as true, and review the lower courts' legal conclusions de novo with no presumption of correctness. Tenn. R. App. P. 13(d); *Owens v. Truckstops of America*, 915 S.W.2d 420, 424 (Tenn. 1996); *Cook*, *supra*.

Stein, 945 S.W.2d at 716.

Our standard with respect to a review of the grant of summary judgment to Mountain Life is different. Our Supreme Court recently reiterated our standard when reviewing the grant of a motion for summary judgment. In ***Martin v. Norfolk Southern Railway, Co.***, 271 S.W.3d 76 (Tenn. 2008), the High Court granted permission to appeal in order "to provide further guidance regarding the application of summary judgment in this State." ***Id***. at 82:

> The moving party is entitled to summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04; *accord Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000). The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993). Accordingly, a properly supported motion for summary judgment must show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998). If the moving party fails to make this showing, then "the non-movant's burden to produce either supporting affidavits or discovery materials is not triggered and the motion for summary judgment fails." *McCarley*, 960 S.W.2d at 588; *accord Staples*, 15 S.W.3d at 88.
>
> The moving party may make the required showing and therefore shift the burden of production to the nonmoving party by either: (1)

affirmatively negating an essential element of the nonmoving party's claim; or (2) showing that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 5 (Tenn. 2008); *see also McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215 n.5. Both methods require something more than an assertion that the nonmoving party has no evidence. *Byrd*, 847 S.W.2d at 215. Similarly, the presentation of evidence that raises doubts about the nonmoving party's ability to prove his or her claim is also insufficient. *McCarley*, 960 S.W.2d at 588. The moving party must either produce evidence or refer to evidence previously submitted by the nonmoving party that negates an essential element of the nonmoving party's claim or shows that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan*, 270 S.W.3d at 5. We have held that to negate an essential element of the claim, the moving party must point to evidence that tends to disprove an essential factual claim made by the nonmoving party. *See Blair v. W. Town Mall*, 130 S.W.3d 761, 768 (Tenn.2004). If the moving party is unable to make the required showing, then its motion for summary judgment will fail. *Byrd*, 847 S.W.2d at 215.

If the moving party makes a properly supported motion, then the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist. *McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215. The nonmoving party may satisfy its burden of production by:

> (1) pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06.

McCarley, 960 S.W.2d at 588; *accord Byrd*, 847 S.W.2d at 215 n.6. The nonmoving party's evidence must be accepted as true, and any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of the nonmoving party. *McCarley*, 960 S.W.2d at 588. "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Byrd*, 847 S.W.2d at 215. A disputed fact presents a genuine issue if "a reasonable jury could legitimately resolve that fact in favor of one side or the other." *Id.*

> Because the resolution of a motion for summary judgment is a matter of law, we review the trial court's judgment de novo with no presumption of correctness. *Blair*, 130 S.W.3d at 763. In addition, we are required to review the evidence in the light most favorable to the nonmoving party and to draw all reasonable inferences favoring the nonmoving party. *Staples*, 15 S.W.3d at 89.

Martin, 271 S.W.3d at 83-84.

IV.

First we will address plaintiff's claim that the trial court erred when it granted Mountain Life's motion for summary judgment. We begin with the fundamental proposition that a party to a written contract is presumed to know its contents. In ***Giles v. Allstate Ins. Co.***, 871 S.W.2d 154 (Tenn. Ct. App. 1993), this Court stated that, assuming there is no fraud[4], if a party:

> "fails to read the contract or otherwise to learn its contents, he signs the same at his peril and is estopped to deny his obligation, will be conclusively presumed to know the contents of the contract, and must suffer the consequences of his own negligence." *Beasley v. Metropolitan Life Ins. Co.*, 190 Tenn. 227, 229 S.W.2d 146 (1950) at 148. *Also see DeFord v. National Life & Accident Ins. Co.*, 182 Tenn. 255, 185 S.W.2d 617, 621 (Tenn. 1945); *Hardin v. Combined Insurance Company*, 528 S.W.2d 31 (Tenn. App. 1975); *Montgomery v. Reserve Life Ins.*, 585 S.W.2d 620 (Tenn. App. 1979).

Giles, 871 S.W.2d at 156. This principal recently was reaffirmed by this Court in ***Stooksbury v. American Nat'l Prop. and Cas. Co***, 126 S.W.3d 505, 518 (Tenn. Ct. App. 2003).

With regard to whether Mr. Howard made a material misrepresentation when he filled out the Application, the relevant statutory provision is T.C.A. § 56-7-103 (2008), which provides as follows:

> No written or oral misrepresentation or warranty therein made in the negotiations of a contract or policy of insurance, or in the application therefor, by the insured or in the insured's behalf, shall be deemed material or defeat or void the policy or prevent its attaching, unless such misrepresentation or warranty is made with actual intent to deceive, or unless the matter represented increases the risk of loss.

[4] Plaintiff makes no allegation of fraudulent conduct on the part of the Bank or Mountain Life when the application was filled out, and there is no proof in the record to support such an allegation.

In ***Smith v. Tennessee Farmers Life Reassurance Co.***, 210 S.W.3d 584 (Tenn. Ct. App. 2006), this Court discussed Tenn. Code Ann. § 56-7-103 as follows:

> Tenn. Code Ann. § 56-7-103 authorizes an insurance company to deny a claim for benefits in two circumstances – if the insured made intentional misrepresentations on the application for insurance or if the insured made misrepresentations that increased the insurer's risk of loss. . . . [D]etermining whether a particular misrepresentation increases an insurance company's risk of loss is a question of law for the court. *Broyles v. Ford Life Ins. Co.*, 594 S.W.2d 691, 693 (Tenn. 1980); *Vermont Mut. Ins. Co. v. Chiu*, 21 S.W.3d 232, 235 (Tenn. Ct. App. 2000). . . .
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> * * *
>
> Tenn. Code Ann. § 56-7-103 authorizes an insurance company to deny a claim if the insured obtains the policy after misrepresenting a matter that increased the company's risk of loss. A misrepresentation in an application for insurance increases the insurance company's risk of loss if it naturally and reasonably influences the judgment of the insurer in making the contract. *Vermont Mut. Ins. Co. v. Chiu*, 21 S.W.3d at 235; *Sine v. Tennessee Farmers Mut. Ins. Co.*, 861 S.W.2d 838, 839 (Tenn. Ct. App. 1993); *Seaton v. National Grange Mut. Ins. Co.*, 732 S.W.2d 288, 288-89 (Tenn. Ct. App. 1987). It need not involve a hazard that actually produced the loss in question. *Loyd v. Farmers Mut. Fire Ins. Co.*, 838 S.W.2d 542, 545 (Tenn. Ct. App. 1992).
>
> The courts may use the questions an insurance company asks on its application to determine the types of conditions or circumstances that the insurance company considers relevant to its risk of loss. *Johnson v. State Farm Life Ins. Co.*, 633 S.W.2d 484, 487 (Tenn. Ct. App. 1981). Additionally, the courts frequently rely on the testimony of insurance company representatives to establish how truthful answers by the proposed insured would have affected the amount of the premium or the company's decision to issue the policy. *See, e.g., Bagwell v. Canal Ins. Co.*, 663 F.2d 710, 712 (6th Cir. 1981); *Vermont Mut. Ins. Co. v. Chiu*, 21 S.W.3d at 235. A finding that the insurer would not have issued the policy had the truth been disclosed is unnecessary; a showing that the insurer was denied information that it, in good faith, sought and deemed necessary to an honest appraisal of insurability is sufficient to establish the grounds for an increased risk of loss. *Vermont Mut. Ins. Co. v. Chiu*, 21 S.W.3d at 235; *Loyd v. Farmers Mut. Fire Ins. Co.,* 838 S.W.2d at 545. . . .

> Tenn. Code Ann. § 56-7-103 does not require a "material" increase in the risk of loss before an insurance claim can be rejected. It is the misrepresentation that must be material, and the statute clearly states that a misrepresentation will not be deemed material unless it increases the risk of loss to the insurer. Therefore, the correct inquiry in cases involving Tenn. Code Ann. § 56-7-103 is simply whether the misrepresentation increased the insurance company's risk of loss.

Smith, 210 S.W.3d at 589-91. *See also* ***Lane v. American Gen. Life and Accident Ins. Co.***, 252 S.W.3d 289 (Tenn. Ct. App. 2007).

In ***Lane***, we were confronted with a similar issue when the surviving wife claimed that her husband had not made any material misrepresentations when filling out an application for life insurance. The application at issue in ***Lane*** specifically stated that the application had to be filled out to the best of the applicant's "knowledge and belief." ***Lane***, 252 S.W.3d at 296. In any event, in ***Lane***, as here, the husband had recently undergone medical treatment which was not listed on the insurance application. As to the recent medical treatment, the ***Lane*** Court stated as follows:

> Wife failed to establish a genuine issue of material fact regarding whether Mr. Lane answered certain . . . questions accurately to the best of his knowledge and belief. Specifically, Mr. Lane failed to list on the application or during the medical examination that he had been treated at the Fort Sanders ER or that he had been treated by the Knoxville Heart Group just a few short weeks before making the application. None of this treatment was mentioned when Mr. Lane was asked to list all doctors and hospitals where he had been treated in the past five years. Mr. Lane's failure to identify this treatment resulted in American General not obtaining the pertinent medical records from these health care providers. In addition, Mr. Lane was asked whether an x-ray, an electrocardiogram, or any other diagnostic test had been performed in the past 5 years. He responded "no", even though he had just within weeks had an x-ray, an electrocardiogram, and another diagnostic test, i.e., the Treadmill Thallium test.
>
> Even applying what Wife maintains is a lesser burden than that created by Tenn. Code Ann. § 56-7-103 on Mr. Lane as an insurance applicant because of the "knowledge and belief" language of the insurance application, the record shows that there is no *genuine* issue of material fact as to Mr. Lane's having knowledge that he had been treated at the Fort Sanders' ER and the Knoxville Heart Group less than a month prior to his making the application. Likewise, the record demonstrates that there is no *genuine* issue of material fact as to Mr. Lane's knowledge that he had an x-ray, an electrocardiogram, and other diagnostic tests performed less than a month before he submitted his application. Accordingly, we agree with the Trial

> Court that there is no genuine issue as to the material facts and the undisputed material facts were such that Mr. Lane made misrepresentations that were material because they increased the risk of loss. The grant of summary judgment to American General is, therefore, affirmed.

Lane, 252 S.W.3d 297.[5]

We reach the same result here as we did in ***Lane***. Mr. Howard underwent significant medical treatment and testing just 4 to 6 months before applying for life insurance. Mr. Howard was diagnosed with chronic liver disease and admonished to stop drinking alcohol. When he filled out the Application, Mr. Howard's liver disease was to the point that he died from cirrhosis and alcoholic liver failure less than six months after knowingly misrepresenting that: (1) he had not been seen by a physician in the previous 12 months; (2) he had not been treated for liver disease in the past 10 years; and (3) he was free from any disease or physical impairment. As explained in ***Smith***, *supra*, whether a particular misrepresentation increases an insurance company's risk of loss is a question of law for the court. Mr. Howard's intentional failure to disclose his chronic liver disease unquestionably increased Mountain Life's risk of loss, as abundantly evidenced by the fact that Mr. Howard was dead from that ailment less than six months later. It defies logic to conclude that the existence of chronic liver disease and cirrhosis brought about by years of alcohol abuse would not naturally and reasonably influence the judgment of Mountain Life when determining whether Mr. Howard was insurable. The medical treatment Mr. Howard received just a few short months before applying for insurance "had to have been within the consciousness of [Mr. Howard] when he responded to the subject questions." ***Lane***, 252 S.W.3d at 297 (Susano, Jr., J., concurring). Mr. Howard's misrepresentations "operate as a complete bar to the suit by [his wife]." ***Id***.

In light of the foregoing, we conclude that the trial court correctly found that Mountain Life was entitled to summary judgment. Any additional issue raised by plaintiff as to Mountain Life are pretermitted.

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[5] In ***Lane***, the undersigned filed a separate concurring opinion stating the following:

> I concur completely in the result reached by the majority. In my opinion, the failure of Mr. Lane to correctly respond to the question pertaining to doctors seen and hospitals visited in the past five years and the question regarding medical tests administered in the same time frame, and the resulting increase in the risk under evaluation by American General, operate as a complete bar to the suit by Wife. Given the very recent nature of these doctor visits, the trip to the hospital, and the tests taken, the information pertaining to these matters had to have been within the consciousness of Mr. Lane when he responded to the subject questions. A trier of fact could not have reasonably found otherwise. Hence, in my judgment, there is no genuine issue of material fact on this critical point.

Lane, 252 S.W.3d at 297 (Susano, Jr., J., concurring).

The final issue is whether the trial court correctly granted the Bank's motion to dismiss. We need not decide whether plaintiff's complaint states a cause of action against the Bank, because even if it did, the Bank is, nevertheless, entitled to dismissal of the complaint. Any claims against the Bank as agent for Mountain Life seeking payment of the insurance proceeds are barred by Mr. Howard's misrepresentations for the exact same reasons that Mountain Life is entitled to summary judgment. Plaintiff also asserts a separate claim against the Bank alleging that Kaye Stewart misrepresented that there was coverage pursuant to the policy and that plaintiff relied on this misrepresentation to her detriment. The fatal flaw with this theory is that any representation made by Stewart as to potential coverage would have been based on the Application as filled out by the Howards. Had the Application, as incorrectly filled out by the Howards, in fact been accurate and truthful, then they likely would have had insurance coverage. There is no allegation or proof that Stewart assured plaintiff that there would be coverage even though Mr. Howard had made material misrepresentations on the Application and was suffering from chronic liver disease. Accordingly, even if the trial court incorrectly determined that plaintiff failed to state a claim upon which relief could be granted pursuant to Tenn. R. Civ. P. 12.06, the Bank nevertheless was entitled to summary judgment pursuant to Tenn. R. Civ. P. 56. *See* ***Delapp v. Pratt,*** 152 S.W.3d 530, 542 (Tenn. Ct. App. 2004)("If the Trial Judge reached the right result for the wrong reason, there is no reversible error.")(quoting ***Shutt v. Bount***, 194 Tenn. 1, 249 S.W.2d 904, 907 (Tenn. 1952)).

V.

The judgment of the trial court is affirmed and this cause is remanded to the trial court solely for collection of the costs assessed below. Costs on appeal are taxed to the appellant, Deborah Lynn Wells Howard, individually and as Executrix of the Estate of Gordan Wayne Howard, and her surety, for which execution may issue, if necessary.

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CHARLES D. SUSANO, JR., JUDGE